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IN THE
SUPREME COURT OF THE UNITED STATES

JESSE DANIEL BUCKLEY,
Petitioner,

v.

JONATHAN RACKARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a deputy sheriff violated the Fourth Amendment by administering three separate five-second-long direct contact "drive-stun" Taser shocks, over a two minute period, to a handcuffed, nonviolent misdemeanor traffic arrestee who had already collapsed to the ground sobbing, who never actively resisted arrest or attempted to flee, and who never posed any danger to himself, the officer or the public, when the sole purpose of the Taser shocks was to administer pain to prompt the arrestee to stand up.

2. Whether a reasonable police officer had fair notice in 2004 sufficient to deprive him of qualified immunity that it violated the Fourth Amendment to administer three separate five-second-long direct contact "drive stun" taser shocks, over a two minute period, to a handcuffed nonviolent misdemeanor traffic arrestee who had already collapsed to the ground sobbing, who never actively resisted arrest or attempted to flee, and who never posed any danger to himself, the officer or the public, when the sole purpose of the Taser shocks was to administer pain to prompt the arrestee to stand up.

PARTIES TO THE PROCEEDING

Petitioner is Jesse Daniel Buckley, plaintiff-appellee below.

Respondent is Jonathan Rackard, Deputy Sheriff of Washington County, Florida, in his individual capacity, defendant-appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the court of appeals is not reported; it is reprinted in the Appendix to the Petition ("App.") at 1a-30a. The district court's opinion is not reported; it is reprinted at App. 34a-37a.

JURISDICTION

The court of appeals issued its decision on September 9, 2008, and denied a petition for rehearing and rehearing en banc on November 5, 2008. App. 31a-32a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The decision of the court of appeals authorizes police officers to inflict excruciating pain and severe burns through repeated direct contact five-second Taser discharges of 50,000 volts of electricity on limp, handcuffed, nonviolent non-resisting arrestees for not following orders to stand up. The incident at issue was captured in its entirety on respondent's patrol car video and is part of the record; it also appears at http://www.youtube.com/watch?v=SWC7iSGCk-s. Petitioner, under arrest for refus-

ing to sign a traffic citation and already handcuffed, exited his car, took several steps towards respondent's patrol car, and then fell to the ground sobbing. Respondent ordered petitioner to get up. Petitioner remained seated on the ground with his head down and his body wracked with sobs, either because he willfully refused to get up or was physically unable to do so by reason of his emotional condition, or because his hands were cuffed behind his back. Respondent repeatedly jammed his Taser into petitioner's back and chest, using it as a cattle prod to inflict a series of crackling five-second-long 50,000 volt electrical shocks that caused 16 burns severe enough to produce keloid scars. The only purpose of the electrical shocks was to inflict pain.

The court's fractured opinion – with one concurrence and a lengthy dissent – licenses officers willfully and repeatedly to inflict severe pain on handcuffed non-resisting arrestees merely to secure compliance with a command to stand up or to move. The opinion conflicts with the decisions of other courts of appeals that have held that although the Fourth Amendment permits law enforcement officers to use reasonable force to apprehend and to subdue a resisting subject, it does not permit the application of punitive force to handcuffed subjects who are already under control and not offering resistance. The Eleventh Circuit's rule turns longstanding Fourth Amendment doctrine on its head; it invites law enforcement officers to administer summary punishment to arrestees; it authorizes the use of extreme repeated pain on limp non-resisting arrestees in contravention of this Court's repeated pronouncements that the Fourth Amendment only permits the use of reasonable force to defend

against, to arrest, and if necessary, to subdue an actively resisting subject. This Court should grant the petition and restore the Fourth Amendment to its understood meaning lest law enforcement officers accept the court of appeals' invitation to abuse, through the repeated infliction of pain, handcuffed arrestees who are already under police control.

1. On March 17, 2004, respondent, a Washington County Florida Deputy Sheriff, stopped and ticketed petitioner for speeding on a road respondent characterized as "desolate" and "out in the middle of nowhere." Petitioner, already apparently distraught, refused to sign the traffic citation and told respondent to take him to jail. In accordance with Florida law, respondent placed petitioner under arrest. Petitioner voluntarily and without resistance submitted to behind-the-back handcuffing while still in his car. Again without resistance, petitioner followed respondent's lead, exited his car and began peacefully to walk towards respondent's patrol car. Petitioner never once resisted, attempted to escape, or even objected to being placed in custody. As petitioner passed the rear of his car, while still a short distance from respondent's patrol car in the grass alongside the roadway, he collapsed to the ground in a sitting position and, in abject despair, began to sob loudly and uncontrollably. Respondent left petitioner sitting on the ground, walked to his patrol car to place his citation booklet on its hood and radio a report, and then returned to attempt to lift petitioner. Petitioner went limp and began to sob even more loudly. Respondent, unable to lift him, pushed or dragged petitioner a few feet further from the side of the deserted road. Neither petitioner nor respondent was in actual or perceived

danger from potential traffic; the video shows them situated a few feet off the road between the patrol car and petitioner's car, parallel with the off-road sides of the two cars.

Respondent warned petitioner that unless he voluntarily arose, respondent would "tase" him. Between sobs, petitioner responded, "I don't care anymore, tase me." Eight minutes into the stop as shown by the video, respondent first applied his Taser to petitioner in "drive-stun" mode, causing petitioner to flinch in pain and attempt to roll away from the electrical discharge; in doing so he rolled several feet further away from the road and behind the line of the two cars. Respondent pursued him, arm outstretched holding his Taser to maintain electrical contact for each full five-second discharge, and forcefully jammed the Taser into multiple sites on petitioner's back and chest. On the video, the electrical crackles of the Taser are clearly heard as petitioner involuntarily jerked and rolled away from the source of pain.

Tasers operate in two modes and serve two different purposes. Their principal use is as a device to subdue, at a safe distance, a dangerous subject; in that mode, an officer operates a Taser by firing two darts that strike and attach to a dangerous individual; thereafter a high voltage low amperage instantaneous electrical discharge produces temporary neuromuscular incapacitation (NMI), rendering the subject harmless and immobile so that an officer can handcuff him and take him into custody without the use of a firearm and attendant deadly force. Tasers also can be used in "drive-stun" mode; as described in Taser's manual, available on its web

site, "drivestun mode will not cause NMI and generally becomes a pain compliance option." It works only when the Taser is in direct contact; for that reason, Taser's manual warns:

> Due to automatic reflex actions, most subjects will struggle to separate from the Taser device. Each time the device comes back in contact with the individual, another set of burn marks may be visible.
>
> Drive-stun Taser use produces a continuous extremely painful electrical shock useful for an officer engaged in close hand to hand combat with a resisting subject; pain forces the resisting subject to stop violently resisting and submit to handcuffing; hence the characterization of its use as pain compliance.

http://www.taser.com/SiteCollectionDocuments/Downloads/MK-INST-M26-001%20REV%20B%20M26%20Manual.pdf at 14 (last visited January 26, 2009). See also at 8-10 (last visited January 26, 2009).

At the conclusion of the first five-second electrical discharge, eight minutes into the stop, petitioner lay fully prone on his side, sobbing loudly and inconsolably. Respondent commanded petitioner to get up and threatened again to tase him; respondent continued sobbing but neither sought to move nor offered any resistance. A mere 20 seconds after first shocking petitioner, respondent again jammed the

Taser into his back. As before, petitioner again involuntarily jerked and rolled, moving even further from the road to escape the repeated electrical shocks and resulting pain even as respondent continued to reapply the device to his back and chest until the full five-second discharge was complete. Petitioner remained weeping in the grass, half-sitting, half-lying helpless and handcuffed some ten feet from the edge of the roadway. Respondent returned to his patrol car, radioed for backup and reported the use of his Taser. With backup now on the way, respondent returned to petitioner one minute after having shocked him a second time, again ordered him to get up, lifted him to a sitting position, and shoved the Taser repeatedly into his back and chest for yet a third five-second discharge, prodding him with each electrical shock even further from the road and out of camera range. Several minutes later a second officer arrived on the scene, and the two officers walked petitioner to respondent's patrol car. Photographs of petitioner show 16 Taser burns, some of which have produced keloid scars.

2. On March 3, 2006 petitioner filed a complaint against respondent and the Sheriff of Washington County, Bobby Haddock asserting claims under 42 U.S.C. § 1983; he sought damages for excessive force in violation of the Fourth and Fourteenth Amendments to the United States Constitution. Both defendants moved for summary judgment on the basis of qualified immunity. By separate orders, the district court granted summary judgment for Sheriff Haddock on petitioner's claim of supervisory liability, but denied respondent's motion, finding that his repeated use of a Taser to inflict pain on a

nonviolent non-resisting handcuffed arrestee violated already clearly established law under the Fourth Amendment. Respondent appealed from the order denying his motion for summary judgment on the basis of qualified immunity.

3.a. In an opinion written by Chief Judge Edmondson, a deeply divided panel of the court of appeals reversed. Judge Edmondson concluded that respondent's use of force was reasonable under the circumstances for three reasons: (1) because "[t]he government has an interest in arrests being completed efficiently and without waste of limited resources," (2) because the demand made by respondent that petitioner get up and walk to the car was a reasonable one with which he could easily comply, and (3) because passing cars raised safety concerns. Against those interests Judge Edmondson concluded that the extreme pain, the burns and what he characterized as minor injuries caused by the repeated application of the Taser were insufficient to violate the Fourth Amendment. More generally, he opined that officers may use "moderate, non-lethal force" to compel a passively non-compliant arrestee to comply with and cooperate in the completion of an arrest by walking to a patrol car. Writing only for himself, Judge Edmondson concluded that even though backup officers were on the way, the third application of the Taser was reasonable given that respondent was still entitled to complete the arrest without waiting for backup.

Alternatively Judge Edmondson concluded that no case decided on substantially similar facts clearly established respondent's use of force was excessive, and that therefore even if that use of force

violated the Fourth Amendment, respondent was entitled to qualified immunity. Distinguishing earlier circuit precedent that might otherwise have clearly established limits on force, Judge Edmondson noted that a reasonable officer could conclude that the time of day, location, and warning "might make a difference" in whether the use of force would violate the law, and therefore entitled the officer to qualified immunity.

b. Judge Dubina concurred specially, agreeing that the first two applications of the Taser were constitutionally permissible, but concluding that the third application, administered while backup was approaching, was constitutionally excessive force. Nevertheless, he concurred that respondent was entitled to qualified immunity absent clearly established law to the contrary.

c. Judge Martin dissented. Noting that "this was not a case about whether an officer may use a taser to subdue an unruly or dangerous individual," she insisted that "the question in the case is whether a taser gun may be used repeatedly against a peaceful individual as a pain-compliance device—that is, as an electric prod—to force him to comply with an order to move." Judge Martin described the petitioner: "Mr. Buckley's only movements after he collapsed on the ground were in response to each discharge of the taser gun. After each discharge was complete, Mr. Buckley sat or laid still, crying, and unwilling or unable to stand." Applying the three *Graham v. Connor*, 490 U.S. 386 (1989) factors, Judge Martin concluded the use of force was excessive from the beginning – petitioner had committed only a nonviolent misdemeanor, he posed no threat to respondent

or others, and at no time did he "*actively* resist arrest or attempt to flee." (emphasis in original).

Turning to qualified immunity, Judge Martin argued that clear law from multiple jurisdictions long ago established that "the Fourth Amendment prohibits the infliction of gratuitous pain and injury as a means to coerce compliance" from handcuffed non-resisting nonviolent arrestees. Moreover, she noted that a Taser is particularly unsuited for use in this fashion given that its excruciatingly painful five second jolts of electricity would prevent petitioner from complying with respondent's demand that he stand. No particularized showing of a case involving materially similar facts was necessary to clearly establish law; she concluded any reasonable officer had fair notice that the infliction of severe pain in the absence of any arguable justification violated the core and obvious principles of the Fourth Amendment.

4. The Court of Appeals denied the petitions for rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals licenses police officers repeatedly to inflict excruciating pain through multiple five-second Taser discharges on handcuffed nonviolent arrestees who are not actively resisting arrest merely to secure compliance with demands to move or to stand up. That holding conflicts with decisions of other circuits that have held that pain compliance may be employed only to capture or subdue a dangerous or actively resisting arrestee, and with decisions holding that both (1)

opinions of this Court and (2) the core principles of the Fourth Amendment provide clear notice to law enforcement officers that such conduct is unlawful. Review is warranted to resolve the conflict in the courts of appeals.

Review is also warranted because both the decision of court of appeals on the Fourth Amendment and its decision on qualified immunity are contrary to *Graham v. Connor*, 490 U.S. 386 (1989) and *Hope v. Pelzer* 536 U.S. 730 (2002) respectively. Considerations of efficiency have never warranted the gratuitous infliction of pain on nonviolent and passive arrestees. By sub silentio resurrecting the "materially similar facts" standard rejected in *Hope v. Pelzer*, the court of appeals has placed beyond remedy patently unconstitutional conduct in this and similar cases.

The questions presented are recurrent questions of ever increasing importance. Tasers have made it possible for officers to inflict pain through electrical discharges, once the exclusive province of agents and implements of torture. Tasers rapidly have become standard equipment in police departments throughout the nation. Although when used at a distance in their primary mode Tasers offer an alternative to deadly force, their drive-stun mode empowers officers to use a Taser as a cattle prod against detainees who neither threaten violence nor actively resist arrest rather than as a legitimate tool to subdue violent resistors. This Court should not allow other officers and law enforcement agencies to believe that respondent's reprehensible behavior is constitutionally permissible. Because the facts of this case were captured on the officer's own

patrol car-mounted video camera, the video offers a uniquely clear record of events against which to articulate a standard for future cases.

I. The Courts Of Appeals Are Divided On The Questions Presented.

The Eleventh Circuit has created a conflict among the circuits where none previously existed. Its ruling – that officers may inflict excruciating pain upon handcuffed nonviolent arrestees who do not actively resist arrest to "persuade" them to obey orders designed only to increase law enforcement efficiency – conflicts with the Second, Ninth, Tenth and, most recently, the Sixth Circuits' holdings that police officers may inflict pain willfully only to capture, subdue or control a violent or actively resisting arrestee; they may not otherwise do so to compel compliance with commands, and allegations of contrary conduct are sufficient to create jury questions in excessive force claims. *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 118, 123-24 (2d Cir. 2004) (concluding that anti-abortion protesters who employed "passive resistance" techniques including going limp stated Fourth Amendment violation against officers who used pain compliance techniques, including choke holds and wrist-bending, because jury could conclude that "the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances"); *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1128-30 (9th Cir.), *cert. denied*, 537 U.S. 1000 (2002) (use of pepper spray on nonviolent nonresisting arrestees violated clearly established law in 1997; "[b]ecause the officers had control over the protestors it would have been clear to any reason-

able officer that it was unnecessary to use pepper spray to bring them under control, and even less necessary to *repeatedly* use pepper spray against the protestors ...." (emphasis in original, denying qualified immunity); *LaLonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000) (using pepper spray "may be reasonable as a general policy to bring an arrestee under control, but in a situation in which an arrestee surrenders and is rendered helpless, any reasonable officer would know that a continued use of the weapon or a refusal without cause to alleviate its harmful effects constitutes excessive force") (denying qualified immunity); *Buck v. City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008) (discharging pepper gas at demonstrator facing possible misdemeanor charges who is lying the on ground violates clearly established law under Fourth Amendment) (denying qualified immunity). *See also Hickey v. Reeder*, 12 F.3d 754, 757 (8th Cir.1993) (use of stun gun upon prisoner who refused order to sweep his cell violates Eighth Amendment prohibition against cruel and unusual punishment).

The conflict among the circuits specifically encompasses the use of Tasers against nonresisting arrestees. *Landis v. Baker*, 2008 WL 4613547 (6th Cir. 2008) held that officers violated clearly established Fourth Amendment law by using a Taser against a handcuffed arrestee who lay on the ground offering no resistance. Although *Landis* represented the Sixth Circuit's first application of excessive force law to the misuse of a Taser during an arrest, the court reasoned that the law prohibiting its misuse was clearly established:

> Even without precise knowledge that the use of the taser would be a violation of a constitutional right, the officers should have known based on analogous cases that their actions were unreasonable. *See Greene v. Barber*, 310 F.3d 889, 898 (6th Cir. 2002) (holding that it may be excessive force to use pepper spray on suspect who was resisting arrest but "not threatening anyone's safety or attempting to evade arrest by flight"); *Vaughn v. City of Lebanon*, 18 Fed. Appx. 252, 266, (6th Cir. 2001) (holding that the use of a chemical spray may be unconstitutional when there is no immediate threat to the safety of the officers or others); *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir.1994) (holding that the use of mace on a compliant suspect is constitutionally unreasonable).

See also Casey v. City of Federal Heights, 509 F.3d 1278, 1285 (10th Cir. 2007) (tasering nonviolent misdemeanant violates clearly established law even though he was not yet handcuffed because "[t]he crime was not severe, Mr. Casey was not threatening, and he was not fleeing the scene," noting that "*Graham* establishes that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest"). All four circuits understood what the Eleventh Circuit failed to grasp – the Fourth Amendment does not permit the deliberate infliction of pain on submissive nonviolent arrestees.

The Eleventh Circuit created conflict by misapprehending the Court's long settled standards governing the use of force. *Graham v. Connor*, 490 U.S. 386 (1989) held and *Scott v. Harris*, 550 U.S. 372 (2007) reaffirmed that objective reasonableness is the touchstone against which all applications of force are to be tested. Three central factors govern the inquiry:

> the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is *actively* resisting arrest or attempting to evade arrest by flight."

Graham v. Connor, 490 U.S. at 396 (emphasis added).

Rather than apply those factors, the Eleventh Circuit introduced governmental efficiency into the balancing calculus that governs the willful infliction of pain, whether euphemized as pain compliance or hyperbolized as torture. Neither *Graham v. Connor* nor *Scott v. Harris* suggests conservation of government resources can justify the deliberate infliction of pain on a nonviolent non-resisting handcuffed arrestee. *Tennessee v. Garner*, 471 U.S. 1 (1985) rejected the use of deadly force even in circumstances in which it offered the most efficient means by which to capture a fleeing subject; indeed, the very purpose of the Fourth Amendment is to subordinate the ever present interest of the government in law enforcement efficiency to the protection of individual liberty. *See Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("the mere fact that law enforcement

may be made more efficient can never by itself justify disregard of the Fourth Amendment"). By concluding that generalized considerations of efficiency trump the right to be free from the unnecessary deliberate infliction of pain, the Eleventh Circuit created circuit conflict with the several circuits that have recognized that the *Graham* holds otherwise. [1]

Respondent was entitled to use reasonable force to take petitioner into custody. None was necessary; petitioner willingly submitted to being handcuffed and to being removed from his car. Under *Graham*, respondent was no longer entitled to use force until and unless petitioner became violent, attempted to escape, or otherwise actively resisted arrest. As the video confirms more eloquently than words, petitioner did nothing but fall to the ground

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[1] The ruling below is only the most extreme example of the Eleventh Circuit's continuing failure to impose constitutional limits on the use of Tasers against nonviolent and nonresisting individuals. *Compare Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004) (officer may without warning fire taser into stopped driver who refused repeated commands to return to vehicle to retrieve insurance papers and bill of lading) *with Casey v. City of Federal Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007) (tasering nonviolent misdemeanant violates clearly established law even though he was not yet handcuffed because "[t]he crime was not severe, Mr. Casey was not threatening, and he was not fleeing the scene)" After describing *Draper v. Reynolds*, Judge McConnell noted in *Casey*, "We are not sure that we would have come to the same conclusion on those facts ..." 509 F.3d at 1286. Relying on *Draper*, the Eleventh Circuit also held the Fourth Amendment permits an officer to fire a Taser at a handcuffed arrestee because, in speaking to the officer while being led to a patrol car, he appeared to spray blood from his broken nose. *Zivojinovich v. Barner*, 525 F.3d 1059 (11th Cir. 2008).

sobbing. He posed no danger to himself, to respondent, or to the public; no more compelling confirmation of that is necessary than the video, where Respondent is seen twice walking back to his patrol car, ignoring petitioner who abjectly lay weeping on the ground.

Perhaps recognizing that the Fourth Amendment does not count governmental efficiency as a factor justifying the deliberate infliction of pain, the Eleventh Circuit majority strained to imagine that petitioner posed two potential threats to officer safety. The court first reasoned that because petitioner's legs were unshackled, he remained a threat to the officer even though he never once attempted to use his legs to resist or escape. But that cannot suffice to license the infliction of pain – officers ordinarily handcuff but do not hogtie arrestees when they take them into custody. Should a cuffed arrestee misuse what freedom of movement remains – by either attempting to flee or to injure an officer – the officer of course may respond with appropriate force, but absent one of those reasons, the Fourth Amendment prohibits an officer from abusing a nonviolent non-resisting subject in the name of pain compliance. Were the Eleventh Circuit's rule the law, then every arrestee whose legs are not shackled would, for that reason alone, be a threat to officer safety subject to the gratuitous infliction of pain.

Next, the court observed that the arrest took place in the vicinity of a roadway, and because roadways posed a danger to both the officer and the arrestee, the officer was authorized to use force even absent active resistance until petitioner was locked in the parked patrol car. But by design and in use,

stopped police cars are always parked on or adjacent to roadways; even arrests effected in buildings require the removal of the arrestee to a patrol car. If proximity of either a patrol car or an arrestee to a roadway justifies the use of force on a nonviolent non-resisting arrestee, then it will always justify the use of force.

Finally, the court below created unnecessary circuit conflict by mischaracterizing the holding of *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995). *Forrester* held only that a jury reasonably could return a defense verdict at trial concluding that the use of two sticks of wood joined by a cord (an OPN) that, when wrapped around an arrestee's wrists tightened while the arrestee was pulled to a standing position until the arrestee voluntarily stood, was reasonable force, but in doing so it emphasized that the arrestee could, by standing, stop immediately any discomfort from the cord's physical pressure. *Forrester* did not license the general use of pain compliance against non-resisting arrestees; to the contrary, it specifically distinguished as clearly unconstitutional "the use of a lighted cigarette, which would create immediate and searing pain" contrasted with the gradually increasing and therefore constitutional pressure of an OPN and noted that the *Forrester* defendants "did all they could to *minimize* the pain inflicted." 25 F.3d at 808 n.5 (emphasis in original). The Ninth Circuit repeatedly has limited *Forrester*, holding it inapplicable to the use of pepper spray, police dogs, and by analogy Tasers. *See, e.g., Headwaters Forrest Defense Council v. County of Humboldt*, 276 F.3d 1125 (9th Cir.), *cert. denied*, 537 U.S. 1000 (2002) (pepper spray); *see also Mendoza*

v. Block, 27 F.3d 1357, 1362 (9th Cir. 1994) ("For example, no particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control. An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury").[2]

Distilled to its essence, the ruling below licenses police officers to use a Taser as a cattle prod to inflict gratuitous pain on a nonviolent handcuffed arrestee for no more reason than to herd him towards a patrol car. This simply cannot be the law in a civilized society.

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[2] The court below ignored undisputed evidence that respondent used his Taser in violation of departmental regulations. Both the Fifth and Ninth Circuits have held departmental regulations and analogous training materials helpful in ascertaining the reasonableness of the use of force:

> Although such training materials are not dispositive, we may certainly consider a police department's own guidelines when evaluating whether a particular use of force is constitutionally unreasonable. As the Fifth Circuit stated, "it may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department or of whose dangers in these circumstances they had been warned." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 449 (5th Cir.1998). *See also Scott v. Henrich*, 39 F.3d 912, 916 (9th Cir.1994) ("Thus, if a police department limits the use of chokeholds to protect suspects from being fatally injured, ... such regulations are germane to the reasonableness inquiry in an excessive force claim").
>
> *Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003).

II. The Court Of Appeals Resurrected Circuit Conflict By Holding That Qualified Immunity Protected Respondent Absent A Case Decided Upon Substantially Similar Facts Rather Than By Applying Hope's Clear Notice Standard.

Hope v. Pelzer, 536 U.S. 730 (2002) overruled aberrant Eleventh Circuit precedent requiring a party seeking to overcome qualified immunity to identify a case previously decided on materially similar facts. *Hope* instructed that all that is required is that the officer have fair notice that his conduct violates the constitution, excising the materially similar facts standard from qualified immunity jurisprudence. Applying *Hope*, *Landis v. Baker*, 2008 WL 4613547 (6th Cir. 2008) held on similar facts that officers who deployed a Taser in drive stun mode three times against a prone detainee who offered no active resistance violated clearly established law even though, unlike Petitioner, he was not handcuffed, stating: "[t]he district court correctly concluded that the officers should have known that the gratuitous or excessive use of a taser would violate a clearly established constitutional right." The Eleventh Circuit's qualified immunity analysis directly conflicts with *Landis*; it also conflicts with *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007) (tasering nonviolent misdemeanor arrestee in 2003 who was not attempting to flee or actively resist arrest violated then already clearly established law); *Buck v. City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008) (discharging pepper gas in 2003 at demonstrator facing possible misde-

meanor charges who was lying the on ground violated then already clearly established law); *Headwaters Forest Defense. v. County of Humboldt*, 276 F.3d 1125 (9th Cir.), *cert. denied*, 537 U.S. 1000 (2002) (use of pepper spray against nonviolent passive non-resisting arrestees in 1997 violated then already clearly established law).

By their nature, excessive force claims often arise from outrageous facts far beyond the pale of permissible force. As *Hope* noted in analogous Eighth Amendment litigation, cases decided on materially similar facts are least likely when conduct strays far from constitutional limits; that is so because reasonable officers already understand that such conduct is forbidden. *Landis v. Baker* is illustrative; no previous case forbidding the use of a Taser to inflict gratuitous pain was necessary to give an officer fair warning that such conduct is prohibited. *See also Mendoza*, 27 F.3d at 1362 ("An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury").

Despite the unequivocal language of *Hope* and the reasoning of other circuits, some panels within the Eleventh Circuit continue to deploy the rejected "materially similar facts" standard; this is but the latest of such cases. *See, e.g., Willingham v. Loughnan*, 321 F.3d 1299, 1300 (11th Cir.), *cert. denied*, 540 U.S. 816 (2003) ("The Supreme Court decision in *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002), did not change the preexisting law of the Eleventh Circuit much) (Edmondson, C.J.); *Snider v. Jefferson State Community College*, 344 F.3d 1325 (11th Cir. 2003) (Edmondson, C.J.);

Purcell ex rel. Estate of Morgan v. Toombs County, Ga., 400 F.3d 1313, 1324 n.25 (11th Cir. 2005) ("Unlike *Hope*, the preexisting case law here varied enough from the material facts of this case that a reasonable jailer could believe that the factual differences could make the situation at this Jail lawful even when circumstances in the earlier cases were determined to be unlawful under federal law: the precedents do not "squarely govern" the case here") (Edmondson, C.J.).

By insisting that petitioner identify a circuit case decided on similar facts to defeat qualified immunity, the Eleventh Circuit resurrected a circuit conflict that *Hope* should have interred. The same cases that establish circuit conflict on the merits of the Fourth Amendment claim also establish circuit precedent on qualified immunity. Those cases hold that the Fourth Amendment's prohibition against the willful infliction of pain on a nonviolent handcuffed arrestee is sufficiently obvious, and lies so clearly at the core of what the Amendment protects, that an officer has fair notice that he must refrain from such conduct even absent a case decided on similar facts. If Buckley had brought his case in the Sixth Circuit, the Second Circuit, or the Ninth Circuit, the court of appeals would have affirmed the district court's order denying summary judgment on the basis of qualified immunity.

III. The Questions Presented Are Recurring Questions Of Ever Increasing Importance.

Since the introduction of Tasers as a law enforcement tool, police departments across the country

have adopted them because of their unique potential to subdue at a distance an individual attempting to escape or to violently resist arrest. Because Tasers lend themselves to arbitrary and gratuitous pain as well as to legitimate law enforcement usage, Taser litigation is on the increase, with a recent Westlaw search revealing more than 100 federal court decisions adjudicating excessive force claims arising from tasers.

IV. The Case Presents An Ideal Vehicle For Review Of The Questions Presented.

The video of respondent's repeated use of a Taser to inflict pain on petitioner makes this an ideal case for this Court to reconfirm and clarify the Fourth Amendment's limits on the use of force. As in *Scott v. Harris*, 127 S. Ct. 1769 (2007), the video precludes arguments over the course of events. The indisputable record of these events facilitates clarity too often foreclosed by conflicting accounts of facts and affords an ideal opportunity to resolve the conflict between the Eleventh Circuit and the Second, Sixth and Ninth Circuits. The Court should grant the Petition, resolve the conflict, and restore the protection of the Fourth Amendment to nonviolent arrestees who do not actively resist arrest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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February 3, 2009

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-10988

D.C. Docket No. 06-00053 CV-5-RS-MD

JESSE DANIEL BUCKLEY,

Plaintiff-Appellee

versus

HON. BOBBY HADDOCK,
in his official capacity as
Sheriff of Washington County,

Defendant,

JONATHAN RACKARD,
in his individual capacity,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(September 9, 2008)

Before EDMONDSON, Chief Judge, and DUBINA, Circuit Judge, and MARTIN.* District Judge.

EDMONDSON, Chief Judge:

This case involves an excessive-force claim and arises from an encounter between a sheriff's deputy

*Honorable Beverly B. Martin, United States District Judge for the Northern District of Georgia, sitting by designation.

and a motorist who refused to submit to lawful arrest during a traffic stop. Deputy Jonathan Rackard seeks interlocutory review of the district court's decision denying him qualified immunity for the repeated use of a taser in effecting the arrest of Jesse Buckley ("Plaintiff"). Because Deputy Rackard's use of force was not unconstitutionally excessive and, in any event, because the preexisting law at the time did not clearly establish that this use of force was excessive, we reverse the district court's decision and remand the case for dismissal of the federal claims against Deputy Rackard.

I. Background[1]

Rackard, a deputy sheriff in Washington County, Florida, stopped Plaintiff for speeding in March 2004. The traffic stop occurred at night on the side of a two-lane highway that had no street lights. It was dark.

Financially destitute and homeless, Plaintiff became agitated about getting a ticket. Plaintiff began to sob. Despite Deputy Rackard's repeated requests, Plaintiff refused to sign the traffic citation: signing is required by law. See Fla. Stat. § 318.14(2)-(3). Deputy Rackard warned Plaintiff twice that, if he did not sign the citation, he would be arrested. After the second warning, Plaintiff said "arrest me." Without resisting, Plaintiff allowed himself to be handcuffed; he was then

[1]The entire incident at issue was depicted in the videotape, which is part of the record. See Scott v. Harris, 127 S. Ct. 1769, 1776 (2007) (stating that the court of appeals "should have viewed the facts in the light depicted by the videotape"). The affidavits and other evidence in the record are consistent with the videotape. We take the record in Plaintiff's favor: so, when we write that Plaintiff says "X", we have accepted "X" as a fact for this appeal.

still sitting in his vehicle.[2] Now handcuffed, Plaintiff got out of his car.

As the deputy started to walk with Plaintiff to the patrol car, Plaintiff -- a 23-year-old young man who weighed 180 pounds and was 6 feet, 2 inches tall -- dropped to the ground behind his car, crossed his legs, and continued to sob. Deputy Rackard cautioned Plaintiff about the danger of getting hit by traffic on the nearby road. Plaintiff responded, "My life would be better if I was dead."[3]

Deputy Rackard asked Plaintiff several times to stand up. Plaintiff did not do so. The deputy then attempted to lift Plaintiff to his feet; but Plaintiff remained limp and did not stand. After repeatedly and plainly warning Plaintiff that a taser device would be used (to which Plaintiff shouted, "I don't care anymore -- tase me") and after giving Plaintiff some time to comply, the deputy discharged the taser. The taser was used for approximately five seconds in the "stun gun" mode. The deputy applied the taser's electrodes directly to Plaintiff's clothed back and chest. After Deputy Rackard discharged the taser, he asked

[2] The issue before us is whether excessive force was used. Plaintiff does not dispute that he refused to sign the traffic citation. For background, see Fla. Stat. § 318.14(2)-(3); Robinson v. City of Miami, 867 So. 2d 431, 432 (Fla. Dist. Ct. App. 2004) (concluding that a refusal to sign a citation establishes probable cause to arrest). By the way, Plaintiff pleaded no contest to one count of refusal to sign a speeding ticket and to one count of resisting arrest without violence; Plaintiff "does not quarrel with his lawful conviction."

Compare Reese v. Herbert, 527 F.3d 1253, 1273 (11th Cir. 2008) (concluding that excessive force was used in the context of an arrest without even arguable probable cause to arrest).

[3] The audio on this sentence is not completely clear. The word "my" might be something else. But we think that it is "my."

Plaintiff again to stand up; but Plaintiff did not comply. Again, the deputy plainly warned Plaintiff that the taser would be used. Plaintiff still did not stand. After some time, Deputy Rackard discharged the taser for another five-second burst. The taser delivers an electrical shock; it hurts.

At this point, Deputy Rackard walked to his patrol car and, by radio, called for backup. Plaintiff remained on the ground. When the deputy returned, he ordered Plaintiff to get up. Again, Deputy Rackard plainly warned Plaintiff that the taser would be used and allowed Plaintiff time to comply. The deputy then attempted a second time to lift Plaintiff to his feet, but to no avail. Plaintiff still did not stand; and the deputy used the taser a third time. Even though Plaintiff continued to resist moving to the patrol car, Deputy Rackard made no more use of the taser.

Once another police officer arrived, Plaintiff promptly relented; and with the assistance of the other officer, Deputy Rackard escorted Plaintiff to the patrol car without incident. Plaintiff suffered sixteen small burn marks on his back from the taser with some scarring (the record does not say whether or not the scars are permanent) and keloid growth around some of the burns.[4] Plaintiff also claims that he suffered emotional injury from the incident: He says that he now finds it difficult to trust police officers and to ask for their assistance.

Plaintiff brought this section 1983 suit against Deputy Rackard in his individual capacity, alleging that the deputy used excessive force in violation of the

[4]The taser was used three times. The taser might have touched Plaintiff more than once each time, however, because Plaintiff would move when the taser was applied. The taser has two prongs; so, Plaintiff says he came into contact with the taser at least eight times.

Fourth Amendment.[5] Deputy Rackard moved for summary judgment on the basis of qualified immunity, which the district court denied.

II. Discussion

A. Excessive Force Claim

That the right to make an arrest "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it" is well established. Graham v. Connor, 109 S. Ct. 1865, 1871-72 (1989).

For excessive force claims, "objective reasonableness" is the test. Zivojinovich v. Barner, 525 F.3d 1059, 1072 (1 1th Cir. 2008). But we have noted some secondary factors to consider: "'(1) the need for the application of force, (2) the relationship between the need and amount of force used, and (3) the extent of the injury inflicted.'" Draper v. Reynolds, 369 F.3d 1270, 1277-78 (1 1th Cir. 2004) (quoting Lee v. Ferraro, 284 F.3d 1188, 1198 (11th Cir. 2002)). The nature and degree of force needed is measured by such factors as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 109 S. Ct. at 1872; see also Lee, 284 F.3d at 1198 ("[T]he force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime, the danger to the officer, and

[5] Plaintiff also sued Bobby Haddock as the Sheriff of Washington County; the district court's decision granting summary judgment to the Sheriff on all claims against him

the risk of flight.").

The Supreme Court teaches that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." Graham, 109 S. Ct. at 1872 (internal quotation marks omitted) (alteration in original). Instead, we must "slosh our way through the factbound morass of 'reasonableness.'" Scott v. Harris, 127 S. Ct. 1769, 1778 (2007); see also Graham, 109 S. Ct. at 1872 ("[P]roper application [of the reasonableness test] requires careful attention to the facts and circumstances of each particular case . . . ."). As we have said before, courts must "look[] to the 'totality of circumstances' to determine whether the manner of arrest was reasonable." Draper, 369 F.3d at 1277.

We do not sit in judgment to determine whether an officer made the best or a good or even a bad decision in the manner of carrying out an arrest. The Court's task is only to determine whether an officer's conduct falls within the outside borders of what is reasonable in the constitutional sense. We are to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Scott, 127 S. Ct. at 1778 (internal quotation marks omitted). In the constitutional context, reasonableness -- on a given set of facts -- is "a pure question of law." Id. at 1776 n.8.

In the light of the undisputed facts established in the record, we conclude that Defendant's use of force in this particular situation was not outside the range of reasonable conduct under the Fourth Amendment. Of particular importance are three facts. First, the incident occurred at night on the side of a highway with considerable passing traffic.[6] Second, the deputy could not complete the ar-

rest -- that is, truly control Plaintiff -- because Plaintiff was resisting. Third, the deputy resorted to using the taser only after trying to persuade Plaintiff to cease resisting, after attempting to lift Plaintiff, and after repeatedly and plainly warning Plaintiff that a taser would be used and then giving Plaintiff some time to comply.

Although, as the district court observed, the underlying offense of refusing to sign a traffic citation was relatively minor, we nevertheless credit the government with a significant interest in enforcing the law on its own terms, rather than on terms set by the arrestee. The government has an interest in arrests being completed efficiently and without waste of limited resources: police time and energy that may be needed elsewhere at any moment. Even though Plaintiff was handcuffed, he still refused repeatedly to comply with the most minimal of police instructions -- that is, to stand up and to walk to the patrol car. That Plaintiff was resisting arrest weighs in the deputy's favor.[7] In addition, to the extent that the incident occurred beside an active highway at night, we also credit the government's interest in the safety of Deputy Rackard, Plaintiff, and even passing motorists: a legiti-

[6] By our count, some 14 vehicles passed nearby the site of the traffic stop during the approximately 8 minutes that the deputy and the Plaintiff were both exposed on the roadside, that is not inside a car.

[7] That Plaintiff did not attack or menace the deputy does not shield Plaintiff from the use of force, even if it might result in pain. See Forrester v. City of San Diego, 25 F.3d 804, 807-08 (9th Cir. 1994) (concluding that there was no violation of the Fourth Amendment where officers used pain compliance techniques -- which caused injuries including bruises, a pinched nerve, and one broken wrist — to move demonstrators who were passively resisting arrest).

mate interest to be advanced by putting Plaintiff in the patrol car. See Pennsylvania v. Mimms, 98 S. Ct. 330, 333 (1977) (acknowledging that the "hazard of accidental injury from passing traffic" may be "appreciable" in some situations). Deputy Rackard warned Plaintiff early on that they should not remain exposed alongside the highway for fear of being hit by a passing vehicle.

Against these important governmental interests weigh the nature and quality of the intrusion on Plaintiff's Fourth Amendment interests. Plaintiff alleges that he sustained, as a result of Deputy Rackard's acts, emotional injury as well as sixteen small taser burns, which caused some scarring and keloid growth. Although Plaintiff's injuries are not insignificant, neither are they severe. Plaintiff points to no evidence in the record that the deputy's use of the taser caused any second-order physical injuries;[8] nor has Plaintiff pointed to evidence that the burns he did sustain required medical attention. Accordingly, we regard the deputy's use of the taser in this particular case as -- at most -- moderate, non-lethal force.[9] See Sanders v. City of Fresno, 551 F. Supp. 2d 1149, 1168 (E.D. Cal. 2008) (viewing "the use of a Taser as an in-

[8] For instance, Plaintiff did not suffer a broken bone or any other physical injury due to contact with the ground caused by the taser shock.

[9] The record does not reveal much about the particular characteristics of the taser used by Deputy Rackard. What little it does reveal shows that the Washington County Sheriff's Department considered tasers to be non-lethal control devices. In addition, other courts have described tasers as non-lethal devices used to control persons resisting arrest. See, e.g., Plakas v. Drinski, 19 F.3d 1143, 1150 n.6 (7th Cir. 1994). Plaintiff points to no evidence in the record showing that tasers are lethal or that they pose a substantial risk of causing serious bodily injury.

termediate or medium, though not insignificant, quantum of force").

While conceding that a single use of the taser might arguably have been reasonable, the district court nevertheless concluded (and Plaintiff argues) that the other applications of the taser were grossly disproportionate and unnecessary, especially given that the arrest had been "fully secured" and given that backup was en route to assist in moving Plaintiff to the patrol car.

We disagree. Never was Plaintiff fully secured until after the second officer arrived. The district court's suggestion that Plaintiff had been fully secured because he was handcuffed is mistaken: Plaintiff was not bound at the feet (so, he could both run and kick), he was moving around on the ground alongside a busy road, and he would not comply with the deputy's repeated instructions to stand up and to move to the patrol car where Plaintiff could be confined. An objectively reasonable police officer could rightly believe that force was therefore necessary to secure the non-compliant Plaintiff in the patrol car and thereby complete the arrest.

We also reject the district court's rationale that had Deputy Rackard "simply waited for back up, two officers could have lifted [Plaintiff] and carried him to the car without any application of force." A single officer in the deputy's situation confronting a non-compliant arrestee like Plaintiff need not -- as a matter of federal constitutional law -- wait idly for backup to arrive to complete an otherwise lawful arrest that the officer has started.

The federal courts must not dictate through their interpretation of the Constitution how the police should allocate their limited resources. In most circumstances where an arrestee is resisting, a single officer can constitutionally effectuate an otherwise lawful arrest by resorting to the use of moderate, non-lethal force. No constitutional basis exists for requiring two or more of-

ficers to make routine arrests, even if deploying more officers might result in less force actually being used. See Menuel v. City of Atlanta, 25 F.3d 990, 996-97 (11th Cir. 1994) ("'The Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases. The only test is whether what the police officers actually did was reasonable.'" (quoting Plakas v. Drinski, 19 F.3d 1143, 1149 (7th Cir. 1994)).

That an officer has requested more police assistance does not make the use of force before reinforcements arrive unreasonable. For instance, that the deputy called for backup after his second use of the taser does not render the third use unreasonable or excessive because the facts and circumstances that justified the first use still apply: that is, Plaintiff continued to resist arrest, the deputy and Plaintiff's safety while on the side of a highway at night was still at risk (not to mention the safety of other motorists), and the use of the taser itself was moderate, non-lethal force.

Needless to say, officers acting alone may not always use any and all force necessary to complete an arrest without assistance. If Deputy Rackard had used more severe techniques (beaten Plaintiff's head with a club or shot him, for example), this case would be a different case. Here, the record shows that Deputy Rackard only used moderate, non-lethal force; and he did so only after reasoning with Plaintiff, then after trying to lift Plaintiff, and finally after repeatedly warning Plaintiff -- a warning given before each use of the taser -- that a taser would be used. In short, Deputy Rackard gave Plaintiff ample warning and opportunity to cease resisting before the deputy resorted gradually to more forceful measures. Even then, Plaintiff's injury was not great; and the deputy hol-

stered his taser after using it briefly three times.

This case is not one where a compliant arrestee was abused for no good reason. Cf., e.g., Hadley v. Gutierrez, 526 F.3d 1324 (11th Cir. 2008) (handcuffed, non-resisting arrestee in the custody of two officers is beaten). In the light of all the circumstances, therefore, we conclude that Deputy Rackard's use of force was not unconstitutionally excessive.[10]

B. Qualified Immunity

Although we conclude that the Constitution was not violated at all, we will also decide about immunity. Even if some of the deputy's use of force was excessive under the Fourth Amendment, we conclude nevertheless that he is entitled to qualified immunity because he -- given the circumstances he was facing -- violated no already clearly established federal right.

In their individual capacities, government officials are entitled to immunity from suit "unless the law pre-existing [their] supposedly wrongful act was already established to such a high degree that every objectively reasonable official standing in [their] place would be on notice that what the defendant official was doing would be clearly unlawful given the circumstances." Pace v. Capobianco, 283 F.3d 1275, 1282 (11th Cir. 2002); see also Marsh v. Butler County, 268 F.3d 1014, 1031 (11th Cir. 2001) (en banc) (stating that "fair and clear notice to government officials is the

[10]We must always recall that police officers are making hard decisions under difficult circumstances and within severe time constraints. Such decisions are easy to criticize later. The law makes allowances for the police officer as the person on the spot. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 109 S. Ct. at 1872.

cornerstone of qualified immunity").

We have pointed out before that "[g]overnment officials are not required to err on the side of caution." Marsh, 268 F.3d at 1030 n.8; see also Saucier v. Katz, 121 S. Ct. 2151, 2158 (2001) ("The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. . . . If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense."). As a consequence, qualified immunity does protect "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 106 S. Ct. 1092, 1096 (1986).

With these principles in mind, Plaintiff must demonstrate that, from the preexisting law, the deputy had "fair and clear notice" that the deputy's conduct would break federal law. See Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002); see also Saucier, 121 S. Ct. at 2156 ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). To show that the law was clearly established in a case like this "where the applicable legal standard is a highly general one, such as 'reasonableness,' preexisting caselaw that has applied general law to specific circumstances will almost always be necessary to draw a line that is capable of giving fair and clear notice that an official's conduct will violate federal law." Thomas v. Roberts, 323 F.3d 950, 954 (11th Cir. 2003). If an earlier case is "fairly distinguishable from the circumstances facing a government official," then that case cannot "clearly establish the law for the circumstances facing that government official." Vinyard, 311 F.3d at 1352; see generally

Marsh, 268 F.3d at 1030-33.

Neither Plaintiff nor the district court has cited case-law establishing that Deputy Rackard's use of the taser was clearly unlawful. Both rely on Lee, 284 F.3d at 1188, in which this Court denied qualified immunity to a defendant police officer on an excessive force claim. In Lee, the facts showed that the officer pulled over a young woman during the afternoon rush hour for a minor traffic violation, forced her out of her car, handcuffed her, and led her to the back of the car where the officer slammed her head against the car's trunk and kept spreading her legs with his foot. Id. at 1191, 1198. Construing the facts in the light most favorable to the woman, the Lee panel stressed that she did not resist the officer at any time during the incident. Id.

The district court thought the present case was "analogous,"[11] concluding that -- like the facts in Lee -- the crime here was minor, Plaintiff posed no threat to the deputy or anyone else, and Plaintiff "never actively resisted or attempted to evade arrest by flight." The district court, as well as Plaintiff in his brief, placed considerable stress on the fact that Plaintiff had already been handcuffed, that Plaintiff resisted only passively, and that the deputy used the taser more than once.

We regard Lee as easily distinguishable from the facts and circumstances of this case. At best, Lee decides only that no officer can use force against an arrestee who is already handcuffed and who is resisting arrest in no way.[12] But unlike Lee, where the court

[11] In the qualified immunity context, "[p]ublic officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases." Hudson v. Hall, 231 F.3d 1289, 1297 (11th Cir. 2000). In the light of preexisting law, "the unlawfulness must be apparent." Anderson v. Creighton, 107 S. Ct. 3034, 3039 (1987).

stressed that the arrestee did not resist at any time during the arrest, here Plaintiff did resist: for example, he physically dropped to the ground, repeatedly refused to comply with the deputy's reasonable orders (even after being warned that a taser would be used), and made no effort to stand when the deputy attempted on two occasions physically to lift Plaintiff to his feet. The use of force in Lee was wholly uncalled for; Lee decides nothing about the gamut of options for force usage in the circumstances of arrestee intransigence. The circumstances that call on police to use some intermediate force -- between no force and deadly force -- remain the cases where the law of excessive force is most ambiguous. It will probably always be so, considering the limitless set of potential different fact combinations and the necessity of allowing for flexible responses from the police.

Lee does not control this case. More important for qualified immunity purposes, an objectively reasonable police officer could have believed that additional facts present here but not present in Lee -- for instance, that Plaintiff was resisting arrest on a roadside at night and that the deputy plainly warned Plaintiff before using the taser -- might "make a difference" about whether the conduct in the present case

[14]In addition to Lee, other cases then in existence similarly established that an officer may not use force against an arrestee who was handcuffed and who was not resisting arrest. See, e.g., Vinyard, 311 F.3d at 1348-49 (holding that the officer used excessive force by discharging pepper spray into the eyes of an arrestee who was handcuffed, secured in the back of the patrol car, and posed no threat to the officer); Slicker v. Jackson, 215 F.3d 1225, 1233 (11th Cir. 2000) (holding that officers used excessive force by repeatedly beating arrestee, "even though he was handcuffed and did not resist, attempt to flee, or struggle with the officer in any way")

would violate federal law. See generally Marsh, 268 F.3d at 1032-33 (discussing when preexisting precedents cannot clearly establish the applicable law). Therefore, whatever fair and clear warning about unconstitutional force that Lee (or any other decisional law that has been drawn to our attention) gives does not reach the factual particularities of this case. Furthermore, the force used here did not approach being so excessive as obviously to violate the Fourth Amendment on its face. Cf., e.g., Priester v. City of Riviera Beach, 208 F.3d 919 (11th Cir. 2000) (denying qualified immunity -- in the absence of controlling judicial precedent -- where defendant police officers ordered dog to attack a compliant, non-resisting arrestee). At the very least, therefore, Deputy Rackard is entitled to qualified immunity.

III. Conclusion

Plaintiff resisted arrest. Given this circumstance in the context of all the other facts, Deputy Rackard's gradual use of force, culminating with his repeated (but limited) use of a taser, to move Plaintiff to the patrol car was not unconstitutionally excessive. In addition, even if Plaintiff could establish that some of the deputy's use of force violated the Fourth Amendment, the deputy still would be entitled to qualified immunity because the applicable law at the time did not clearly establish that the deputy's conduct -- given the circumstances -- was unconstitutional. Accordingly, the district court erred in denying Deputy Rackard's motion for summary judgment.

REVERSED and REMANDED.

DUBINA, Circuit Judge, concurring specially:
Although I believe that Deputy Rackard's conduct of

applying the taser on the third occasion violated the Constitution, nevertheless, I agree with Chief Judge Edmondson that such violation was not clearly established. Accordingly, I agree that we should reverse the district court's denial of summary judgment based on qualified immunity.

MARTIN, District Judge, dissenting:

I respectfully dissent from the judgment in this case. I write to express my view that the Fourth Amendment forbids an officer from discharging repeated bursts of electricity into an already handcuffed misdemeanant—who is sitting still beside a rural road and unwilling to move—simply to goad him into standing up. I also conclude that at the time of the incident, Deputy Rackard was on fair notice that his conduct was unconstitutional. Not only did Deputy Rackard unnecessarily discharge his taser gun against Mr. Buckley three times, but each time he did so, he repeatedly prodded Mr. Buckley's body with the stun gun's live electrodes—inflicting additional pain and leaving Mr. Buckley with sixteen burn scars. Because our law clearly establishes such conduct as unconstitutional, I would affirm the district court's denial of qualified immunity and allow this action to proceed.

I.

A video captured the events in question, and I suggest it be published together with this opinion. See Scott v. Harris, --- U.S. ----, 127 S. Ct. 1769, 1775 n.5, 167 L. Ed. 2d 686 (2007). Because the factual details are important to the required analysis, I will supplement those included in Chief Judge Edmondson's opinion, stated in a light most favorable to Mr. Buckley.

After Deputy Rackard handcuffed Mr. Buckley, he voluntarily got out of his car and walked with Deputy

Rackard to the back of the car, but he then collapsed into a sitting position on the grass beside the road. The road was, by Deputy Rackard's description, "desolate"[1] and "out in the middle of no where."[2] There was scant traffic.[3] Mr. Buckley sat motionless with one leg crossed, leaning forward and sobbing.

After observing Mr. Buckley collapse and after attempting to persuade him to stand, Deputy Rackard turned away from Mr. Buckley and walked to his police car to communicate his status over the police radio. For thirty-five seconds, Mr. Buckley sat unattended. When Deputy Rackard returned and first attempted to lift Mr. Buckley, Buckley remained limp. Deputy Rackard partially lifted Mr. Buckley and dragged him several feet away from the road. Mr. Buckley remained limp and uncooperative as he was dropped to the ground. Deputy Rackard again unsuccessfully attempted to persuade Mr. Buckley to stand up, and the following conversation transpired:

Deputy Rackard: [I"m] going to tase you. Do you understand me?

Mr. Buckley: [Crying] Go ahead.

Deputy Rackard: Buckley, get up ok?

Mr. Buckley: [Crying]

[1] (Appellant's Br. at 6, 25.)

[2] (Appellant's Br. at 20.)

[3] I respectfully disagree with Chief Judge Edmondson's description of the scene of the incident as a "busy road" with considerable passing traffic." (Op. of Edmondson, C.J., at 8, 11.) In the two minutes that transpired between the time Mr. Buckley collapsed on the ground and the time Officer Rackard discharged the taser the first two times, only two cars drove by. Only three more cars passed by the time Deputy Rackard tased Mr. Buckley the final time, two minutes later.

Deputy Rackard: [Places taser on Mr. Buckley"s back.] I"m fixing to tase you. Get off the ground, ok?

Mr. Buckley: [Crying] I don"t care anymore. Tase me. [Sound of taser.]

(Buckley Video at 8:01:25.)

As the taser was applied that first time, Mr. Buckley cried out and fell forward from his seated position, with his chest on the ground, his knees bent and his legs folded underneath him. Mr. Buckley squirmed on the ground in response to the taser, but Deputy Rackard followed Mr. Buckley"s movement, attempting to maintain the taser gun"s contact with Mr. Buckley"s back. When Deputy Rackard lost contact with Mr. Buckley"s body, he immediately replaced the taser on him. Mr. Buckley unfolded his legs and lurched forward onto the right side of his body. The clicking of the taser gun continued and Deputy Rackard removed the gun from Mr. Buckley"s back, pinned it briefly against his chest, and then returned it to his back. Deputy Rackard continued holding the taser gun against Mr. Buckley"s back until it completed its five-second discharge.[4]

Upon completion of the first discharge, Mr. Buckley laid flat with his chest and face on the ground and his

[4] Deputy Rackard testified during an internal investigation that the multiple burns on Mr. Buckley"s body were caused by his repeated efforts to replace the taser gun on Mr. Buckley"s body during each electric discharge: "[A]s I, uh, administered the taser . . . the subject began to roll in an attempt to get away from it. . . . The taser made multiple contact[s] with him on his upper body region because of the rolling action in his attempt to get away." (Ex. H to Pl."s Resp. to Defs." Mot. for Summ. J. at 4 (Statement of Deputy Rackard, Nov. 3, 2006).)

hands still cuffed behind his back, crying. Three seconds passed, and Deputy Rackard ordered Mr. Buckley to stand up, threatening again to shoot him with the taser gun. Though Mr. Buckley had been responsive and defiant before, he did not respond to Deputy Rackard"s second warning.

Deputy Rackard again discharged the taser into Mr. Buckley"s back, just twenty seconds after he had completed his first five-second discharge. This second tase also lasted five seconds. In response to the taser, Mr. Buckley flipped over onto his back, causing the taser gun to lose contact with his body. Deputy Rackard quickly re-pinned it onto Mr. Buckley"s chest, and in response, Mr. Buckley jerked forward. As with the first tase, Deputy Rackard followed Mr. Buckley"s movements in attempt to continue the contact between the taser and Mr. Buckley"s body. Deputy Rackard replaced the nodes of the taser onto Mr. Buckley"s back, lost contact, then lodged the taser gun a final time into Mr. Buckley"s back, holding it steady until it completed its discharge.

After the second discharge, Deputy Rackard stood up silently, turned away from Mr. Buckley, and returned to his police vehicle, leaving Mr. Buckley unattended on the side of the road for the second time. He returned approximately thirty seconds later and again ordered Mr. Buckley to stand up. Mr. Buckley sat cross-legged, leaning forward and still crying. He offered no response to Deputy Rackard. After again attempting to lift Mr. Buckley, Deputy Rackard pressed the taser gun against Buckley's back, warned Buckley, and discharged it a third time.

The final discharge caused Mr. Buckley again to lurch forward onto his side. As Deputy Rackard had before, he followed the movement of Mr. Buckley's body with the taser gun. He lost contact with Mr. Buckley's

body at least four times, and each time re-pinned the taser against Mr. Buckley onto different areas of Mr. Buckley's chest and back.

After the final discharge, Deputy Rackard left Mr. Buckley for the third time and returned to his police car. He announced over the radio that the "subject's in custody; not wanting—refusing to come to the car." He approached Mr. Buckley briefly and again returned to his patrol car, leaving Mr. Buckley unattended for the fourth time during the encounter. Less than three minutes later—and five minutes from the time Deputy Rackard first tased Mr. Buckley—a second officer arrived on the scene. The two officers easily lifted Mr. Buckley off the ground and escorted him away. This action followed.

II.

The first question, as instructed by Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), is whether Deputy Rackard used excessive force. This is not a case about whether an officer may use a taser gun to subdue an unruly or dangerous individual. See Zivojinovich v. Barner, 525 F.3d 1059, 1073 (11th Cir. 2008) ("[I]n a difficult, tense and uncertain situation the use of a taser gun to subdue a suspect who has repeatedly ignored police instructions and continues to act belligerently toward police is not excessive force.") (citation and internal quotations omitted); Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004) (same). Rather, the question in the case is whether a taser gun may be used repeatedly against a peaceful individual as a pain-compliance device—that is, as an electric prod—to force him to comply with an order to move. Accord Hickey v. Reeder, 12 F.3d 754, 757-58 (8th Cir. 1993) (holding single use

of stun gun against prisoner to compel compliance with order to sweep cell was excessive under the Eighth Amendment as a matter of law).

Like the district court below, I conclude that the repeated and sustained use of the taser gun for the sole purpose of coercing Mr. Buckley to move was unreasonable under the circumstances and thus violated the Fourth Amendment.

A.

The Fourth Amendment affords a police officer "the right to use some degree of physical coercion" in effecting an arrest, Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), but the use of force must be "reasonably proportionate to the need for force." Zivojinovich, 525 F.3d at 1073. "'[D]etermining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.'" Vinyard v. Wilson, 311 F.3d 1340, 1347 (11th Cir. 2002) (quoting Lee v. Ferraro, 284 F.3d 1188, 1197 (11th Cir. 2002)). In conducting the objective inquiry under the Fourth Amendment, the Supreme Court has instructed us to give "careful attention" to three factors: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is *actively* resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396 (emphasis added).

B.

I begin by observing that all three Graham factors weigh strongly in Mr. Buckley's favor.

First, the crimes for which Mr. Buckley was arrested--failure to sign a traffic citation and resisting arrest without violence--were non-violent misdemeanors. As such, Mr. Buckley's crimes were of "'minor severity' for which less force is generally appropriate." Reese v. Herbert, 527 F.3d 1253, 1274 (11th Cir. 2008) (quoting Vinyard, 311 F.3d at 1348-49).

Second, Mr. Buckley did not present an immediate threat to Deputy Rackard or others. The video demonstrates that once he was handcuffed, Mr. Buckley voluntarily got out of his car, walked part of the way to the patrol car, then collapsed on the ground in a seated position. He sat still and cross-legged, with his hands cuffed behind his back. Mr. Buckley's only movements after he collapsed on the ground were in response to each discharge of the taser gun. After each discharge was complete, Mr. Buckley sat or laid still, crying, and unwilling or unable to stand.[5] The video demonstrates that as Mr. Buckley responded to the taser, he moved away from the highway, not closer to it. At no time were Deputy Rackard or Mr. Buckley closer to the highway than they had been when Deputy Rackard first stopped the car.

Finally, Mr. Buckley did not *actively* resist arrest or attempt to flee. Rather, the video shows an emotionally overwrought individual, through sobs, *passively* refusing, if not unable, to comply with Deputy Rackard's directive

[5] Although Chief Judge Edmondson suggests that Mr. Buckley "could both run and kick" because his legs were not restrained and "was moving around on the ground alongside a busy road" (Op. of Edmondson, C.J., at 11), the video illustrates that Mr. Buckley was in no condition to run, never kicked, and moved only when his body was tased.

to pull himself up from the ground.

Deputy Rackard's own behavior during the encounter, as seen on the video, further evidences that Mr. Buckley posed no danger or risk of flight.[6] In the six-minute period that transpired after Mr. Buckley was handcuffed and on the ground, Deputy Rackard turned away from him and returned to his patrol car on *four* separate occasions, leaving Mr. Buckley unattended for substantial periods of time.[6] During the encounter, Deputy Rackard also advised over the radio that Mr. Buckley was "in custody." Based on these circumstances, neither Deputy Rackard nor any reasonable officer on the scene could have concluded that Mr. Buckley was actively resisting arrest or attempting to flee.[7]

C.

Although the Eleventh Circuit has not spoken in terms of "pain compliance," at the very least, the Fourth Amendment prohibits the infliction of gratuitous pain and injury

[6] Deputy Rackard strains to make the argument that Mr. Buckley "actively" resisted arrest, but he states that "the form the active resistence took was essentially gravitational," and Mr. Buckley's conduct amounted to a "roadside sit down strike." (Appellant's Br. at 23-24.) There would have been little reason for the Supreme Court to use the adverb "actively" if its conception of "active resistance" included resistance by *inaction*— that is, by a fully limp arrestee who refuses an order to stand. See Graham, 490 U.S. at 396.

[7] In his testimony, Deputy Rackard appears to recognize that Mr. Buckley did not present a danger or a risk of flight. He testified during an internal investigation that he chose to switch the taser gun to stun-gun mode, as opposed to electric-dart mode, because the "threat of physical violence to myself was minimized, uh, and I felt that at the time a touch tase would be more appropriate given the subject was handcuffed and on the ground." (Ex H to Pl.'s Resp. to Defs.' Mot. for Summ. J. at 3 (Statement of Deputy Rackard, Nov. 3, 2006).)

as a means to coerce compliance. E.g., Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 118, 123-24 (2d Cir. 2004) (concluding that protesters who employed "passive resistance" techniques including going limp stated Fourth Amendment violation against officers who used pain compliance techniques, including choke holds and wrist-bending, because jury could conclude that "the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances"); Headwaters Forest Def. v. County of Humboldt, 276 F.3d 1125, 1128-30 (9th Cir. 2002); Forrester v. City of San Diego, 25 F.3d 804 (9th Cir. 1994);[8] cf. Asociacion de Periodistas de Puerto Rico v. Mueller, 529

F.3d 52, 60 (1st Cir. 2008) (concluding that "mere obstinance by a crowd, without any evidence of a potential public safety threat or other law enforcement consideration," did not justify use of batons and pepper

[8] Chief Judge Edmondson cites Forrester in support of the proposition that pain may be inflicted on a passively resisting arrestee to coerce compliance. Forrester, however, simply upheld a jury's conclusion that officers did not use excessive force when they used painful wrist grips, wrist- and arm-twisting, and pressure point holds to move unwilling protesters arrested at a medical building. 25 F.3d at 807-08.

In upholding the jury verdict in favor of the City of San Diego, the Ninth Circuitemphasized that the nature of the force was "less significant than most claims of force" and the state interest in maintaining order was high in light of the presence of more than 100 protesters "operating in an organized and concerted effort to invade private property, obstruct business, and hinder law enforcement." Id. at 807. The court also noted that "the officers used minimal and controlled force in a manner designed to limit injuries to all involved." Id. at 808. The restraint device used by the officers in Forrester was described by the court as producing discomfort that was "gradual in nature," and the court contrasted it with use of force "which would create immediate and searing pain." Id. at 808 n.5. The use of the taser by Deputy Rackard produced pain that was neither limited nor gradual.

spray). A taser functions by sending an "electric pulse through the body of the victim causing immobilization, disorientation, loss of balance, and weakness." Matta-Ballesteros v. Henman, 896 F.2d 255, 256 n.2 (7th Cir. 1990). When used successfully, a taser renders an individual incapacitated, disoriented, and *unable* to move.

Hickey, 12 F.3d at 757 (noting that when used effectively, a stun gun "temporarily incapacitate[s] a threatening person, [giving] the officers involved momentary advantage and a chance to neutralize the threat"). Thus, by its design, a taser is particularly unsuited as a pain-compliance device.

Perhaps for this reason the Washington County Sheriff's Office did not authorize Deputy Rackard to use it in such a manner.[9] Each five-second discharge in fact frustrated Deputy Rackard's efforts in getting Mr. Buckley to stand and walk to the police car.[10] Cf. Headwaters Forest, 276 F.3d at 1130 (stating that it was "even *less* necessary to *repeatedly* use pepper spray against the protesters when they refused to release").

D.

Balancing the individual interests at stake against the need for force, the repeated use of the ta-

[9] The Washington County Sheriff's Office Policy and Procedures Manual provides only that the taser

> may be used to control a dangerous or violent subject when deadly physical force does not appear to be justified and/or necessary; or attempts to subdue the subject by other conventional tactics have been, or likely will be, ineffective in the situation at hand; or there is reasonable expectation that it will be unsafe for officers to approach within contact range of the subject.

(Ex. E to Pl.'s Resp. to Defs.' Mot. for Summ. J., Washington County Sheriff's Office Policy and Procedures Manual, No. 330, at 1.)

ser gun against Mr. Buckley was a wholly disproportionate response to the need to remove Mr. Buckley from the roadside and transport him to the police station.

First, Deputy Rackard's use of force caused gratuitous pain and injury. Deputy Rackard used the taser gun against Mr. Buckley three times and applied the full force of each five-second discharge. As Mr. Buckley moved in response to each shocking, Deputy Rackard followed his movements, repeatedly re-pinning the taser gun onto different areas of Mr. Buckley's body, maximizing pain and injury. The taser gun caused immediate pain and was not applied gradually. Mr. Buckley described the pain as "tremendous" and "intense."[11] Deputy Rackard's repeated prods caused Mr. Buckley sixteen burn scars, which evidence the level of pain he experienced. Although it is difficult to see how even a single, brief electric discharge could have been reasonable under these circumstances, see Hickey, 12 F.3d at 757-58, there can be little doubt that the continuous and repeated manner in which Deputy Rackard discharged the taser gun was grossly disproportionate to the need to move Mr. Buckley from the side of the road.

Second, as discussed above, Deputy Rackard's use of the taser gun did little to further the state interest in completing the arrest. Given the disabling effects of a tase, it is not surprising that Mr. Buckley did not re-

[10] Mr. Buckley states that Deputy Rackard's repeated jabs with the taser gun "ma[de] it harder for me to follow his commands. Without the use of the Taser by Deputy Rackard, I could have recovered my composure and followed the officer's commands sooner than I did." (Buckley Aff. ¶ 5, Feb. 7, 2007, Ex. A to Pl.'s Resp. to Defs.' Mot. for Summ. J.)

[11] (Buckley Aff. ¶¶ 5, 8, Feb. 7, 2007, Ex. A to Pl.'s Resp. to Defs.' Mot. for Summ. J.)

spond to Deputy Rackard's orders and warnings any time after Deputy Rackard first discharged the taser gun.[12] Viewing the evidence in a light most favorable to Mr. Buckley, each five- second discharge frustrated Mr. Buckley's ability to comply with Deputy Rackard's order to stand and further reduced the need for force. It was thus unreasonable for Deputy Rackard to discharge the taser gun against Mr. Buckley a second time within only twenty seconds of the first discharge, when Mr. Buckley had not had sufficient time to regain his composure. And the lack of effectiveness of the first two discharges rendered the final discharge–inflicted after Deputy Rackard had called for backup––wholly unnecessary and cruel. Because Deputy Rackard's repeated use of the taser was "not a good faith effort to restore discipline," see Orem v. Rephann, 523 F.3d 442, 447 (4th Cir. 2008), and resembled more an "exaggerated response to [Mr. Buckley's] misconduct and a summary corporal punishment," Hickey, 12 F.3d at 759, it was not reasonable under the Fourth Amendment.

Finally, reasonable alternatives existed to move Mr. Buckley. Besides any number of less injurious, more effective and safer forms of pain-compliance techniques, Deputy Rackard had the option of calling for assistance. Indeed, pursuant to the policy of his police department, Deputy Rackard was required to do so upon discharging the taser gun.[13] Deputy Rackard has introduced no evidence that

[12] Although Chief Judge Edmondson also relies on Deputy Rackard's pre-tase warnings in support of his conclusions, a warning cannot immunize otherwise excessive force from constitutional scrutiny. See Headwaters Forest, 276 F.3d at 1128-30 (holding repeated use of pepper spray against passively resisting protesters unconstitutional despite fact that officers warned plaintiffs before each discharge).

summoning the assistance of a backup police officer was burdensome at the time of the incident. The video demonstrates that backup arrived within five minutes of his request. Accord Headwaters Forest, 276 F.3d at 1128-30 (noting that officers could have moved protesters and removed lock- down devices "in a matter of minutes without causing pain or injury"). Under these circumstances, it was unreasonable for Deputy Rackard to repeatedly shock Mr. Buckley with the taser gun.

E.

Chief Judge Edmondson emphasizes the state interest in roadside safety and efficiency in single-officer arrests in concluding that Deputy Rackard's use of force was constitutionally reasonable. However, the individual interests protected by the Fourth Amendment do not so easily give way. Many police encounters occur on the roadside at night, and each carries risks that could theoretically be reduced if police officers were authorized to inflict pain as a way to expedite their law-enforcement efforts. In this case, those risks were at a minimum, however, because traffic was scarce and Mr. Buckley and Deputy Rackard remained a good distance from the road.

[13] The Washington County Sheriff's Office Policy and Procedures Manual provides:

> 1. Officers deployed with an AIR TASER shall:
>
> a. Upon encountering a situation, which may require the use of an AIR TASER, request the response of a back-up and a supervisor with an AIR TASER unit **(CODE ZEBRA)**
>
> b. When practical, don't escalate the situation prior to the arrival of a back up officer and equipped supervisor.

(Ex. E to Pl.'s Resp. to Defs.' Mot. for Summ. J., Washington County Sheriff's Office Policy and Procedures Manual, No. 330, at 3, Section 2.E.1. ("Field Officer Responsibilities").)

Neither did Deputy Rackard's repeated use of a taser gun against Mr. Buckley conserve resources. Mr. Buckley was easily moved from the side of the road to the patrol car by two officers. The Washington County Sheriff enacted a policy generally requiring the presence of a second office once a taser had been discharged. Thus Deputy Rackard did nothing to avoid the necessity for the involvement of other officers by applying the taser gun to Mr. Buckley, because backup was thereby required and, in any event, was already en route.

F.

In sum, I conclude that no reasonable officer could have believed that the force used by Deputy Rackard was necessary in response to the situation at hand. Lee, 284 F.3d at 1197. Accordingly, under the first prong of Saucier, I would hold that Mr. Buckley has brought forth sufficient evidence to state a Fourth Amendment violation against Deputy Rackard.

III.

I would also find, under the second prong of Saucier, that the law was clearly established at the time of the incident that Deputy Rackard's conduct was unconstitutional. Whatever the debatability of employing a single, controlled electric shock against a non-compliant individual to coerce him into movement, in this case Deputy Rackard repeatedly prodded Mr. Buckley's body which maximized the level of pain he experienced. In light of the repeated and continuous nature of the force used against Mr. Buckley, the substantial pain and bodily injury that resulted, and the absence of any arguable justification, I have

no difficulty in concluding that no particularized pre-existing case law was necessary for it to be clearly established that Deputy Rackard's conduct was unconstitutional. Deputy Rackard's use of force was so grossly disproportionate to the need for force that no reasonable officer would have believed such conduct was legal. See Lee, 284 F.3d at 1198-99 (holding that qualified immunity should be denied where an officer's conduct "lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law") (citation and internal quotations omitted); Hope v. Pelzer, 536 U.S. 730, 745, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002) (denying qualified immunity for "obvious cruelty" despite lack of factually similar prior precedent); Priester v. City of Riviera Beach, 208 F.3d 919, 926 (1 1th Cir. 2000) ("It would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books.") (quoting McDonald v. Haskins, 966 F.2d 292, 295 (7th Cir. 1992)).

Accordingly, I would affirm the district court's denial of qualified immunity.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-10988-GG

JESSE DANIEL BUCKLEY,

Plaintiff-Appellee,

versus

HON. BOBBY HADDOCK,
in his official capacity as
Sheriff of Washington County,

Defendant,

JONATHAN RACKARD,
in his individual capacity,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: EDMONDSON, Chief Judge, and DUBINA, Circuit Judge, and MARTIN,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/J.L. Edmondson
CHIEF JUDGE

ORD-42

*Honorable Beverly B. Martin, United States District Judge for the Northern District of Georgia, sitting by designation.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PANAMA CITY DIVISION

JESSE DANIEL BUCKLEY,
Plaintiff,

vs. **Case no. 5:06cv53-RS**

HON. BOBBY HADDOCK, in his official capacity as Sheriff of Washington County and JONATHAN RACKARD, in his individual capacity,
Defendants.

AMENDED ORDER

Before the Court is Defendants' Motion for Summary Final Judgment (Doc. 14). The motion is denied as to Deputy Rackard.

I. FACTS

Buckley claims that Rackard violated his rights under the Fourth Amendment because Rackard used excessive force after arresting him. Rackard asserted the affirmative defense of qualified immunity. The facts underlying the Court's decision to deny qualified immunity to Rackard are straightforward and undisputed since there is a videotape of the incident.

Buckley was stopped by Rackard on March 17, 2004, for speeding. After Buckley repeatedly refused to sign the citation, Rackard arrested Buckley. Buckley was handcuffed without any active resistance on his part. As Buckley was being led back to Rackard's patrol car, Buckley sat down on the ground with his legs

crossed. Rackard repeatedly ordered Buckley to stand up, but Buckley refused and continued to sit on the ground crying. To get Rackard to move, Buckley administered a taser gun to Buckley's torso, without the darts, three successive times, causing multiple direct contacts with the electrodes. The only apparent purpose for using the taser was to cause the restrained Buckley, who had not been violent or dangerous, to get into Rackard's car. A few minutes later, Rackard placed a willing and non-violent Buckley back in his patrol car. Because the taser applications, Buckley suffered several burn marks, resulting in intense pain and keloid growth at the site of some burns.

II. DISCUSSION

Qualified immunity offers "complete protection for government officials sued in their individual capacities as long as 'their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known.'"[1] Durruthy v. Pastor, 351 F.3d 1080, 1087 (11th Cir. 2003). "Whether a defendant is entitled to qualified immunity is a question of law, in other words, whether the law at the time of the incident was clearly established so that a reasonable person should have known that he was violating it." Id. "In

[1] "In order to receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002). It is clear that Rackard was acting within his the scope of his discretionary authority when the arrest took place, thus the burden shifts to Buckley to show that Rackard is not entitled to qualified immunity. Id.

evaluating claims of qualified immunity, we apply the two-part Saucier test: (1) As a threshold question, a court must ask, [t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?; and (2) If a constitutional right would have been violated under the plaintiff's version of the facts, the court must then determine 'whether the right was clearly established." Id. (internal citations and quotations omitted).

In evaluating whether Buckley's Fourth Amendment right to be free from excessive force in the course of arrest was violated, the Court must determine "whether a reasonable officer would believe that this level of force is necessary in the situation at hand." Lee v. Ferraro, 284 F.3d 1188, 1197 (11th Cir. 2002). The Supreme Court has held that the following factors should guide a court's inquiry: 1) the severity of the crime at issue; 2) whether the suspect poses an immediate threat to the safety of the officers or the others; and 3) whether he is actively resisting or attempting to evade arrest by flight." Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989); see also, Leslie v. Ingram, 786 F.2d 1533, 1536 (11th Cir.1986) (holding that, in determining if force was reasonable, courts must examine (1) the need for the application of force, (2) the relationship between the need and amount of force used, and (3) the extent of the injury inflicted). All of the Graham factors weigh heavily in favor of Buckley - his crime was minor (speeding), he never posed a threat to the officer or the safety of anyone else, and he never actively resisted or attempted to evade arrest by flight. After viewing the videotape of the incident,

it may be arguable that one application of the taser was appropriate; however, the multiple applications of force were unnecessary and grossly disproportionate. If Rackard had simply waited for back up, two officers could have lifted Buckley and carried him to the car without any application of force. As a result, Buckley has satisfied the first prong of the Saucier test.

In order to survive Defendants' Motion for Summary Judgment, Buckley must still show that the law at the time of the incident had clearly established that the force used by Rackard was excessive. According to the Eleventh Circuit, there are two ways to prove this: 1) to point to a "materially similar case [that has] already decided that what the police officer was doing was unlawful"; or 2) to show "that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law." Lee v. Ferraro, 284 F.3d 1188, 1199-2000 (11th Cir. 2002). The Court finds that the facts in Lee are factually analogous to this case. In Lee, the plaintiff was pulled over for a minor traffic violation, pulled out of her car, handcuffed, and after she was secured, the arresting officer slammed her head onto the trunk of her car and kept spreading her legs with his foot. In this case, Buckley was pulled over for a minor traffic violation, pulled out of his car, handcuffed, and after he was secured, the arresting officer tased him three successive times (two in rapid succession followed by a third application more than a minute later) with the electrodes directly touching Buckley's body, resulting in burns on his back. While "the right to make an arrest ... necessarily carries with it the right to use some de-

gree of physical coercion or threat thereof to effect it," under the facts of this case, no reasonable officer could believe that using such extreme force was lawful. Id. at 1200. As the Eleventh Circuit stated, "once an arrest has been fully secured and any potential danger or risk of flight vitiated, a police officer cannot employ... severe and unnecessary force." Id. In a situation very similar to that in Lee, Rackard's actions were "so plainly unnecessary and disproportionate, no reasonable officer could have had a mistaken understanding as to whether [the] particular amount of force [was] legal in the circumstances." Id. (Internal quotations and citation omitted). Rackard is not entitled to qualified immunity.

ORDERED on March 6, 2007.

/s/ Richard Smoak
RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

126 (2)

No. 08-996

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JESSE DANIEL BUCKLEY,

Petitioner,

v.

JONATHAN RACKARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a deputy sheriff violates the Fourth Amendment when he deploys a Taser three times in "drive-stun" mode to accomplish a lawful arrest on an actively but not violently resisting person after repeated warnings the Taser would be used if compliance with lawful orders did not occur, where the officer is alone, at night, immediately adjacent to a dark highway.

2. Whether it was clearly established, so as to defeat the individual qualified immunity from suit enjoyed by a deputy sheriff, that a lone deputy who uses a Taser in drive-stun mode three times to accomplish a lawful arrest on an actively but not violently resisting person after repeated warnings immediately adjacent to a dark highway is violative of the Fourth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is Jesse Daniel Buckley, Plaintiff-Appellee below.

Respondent is Jonathan Rackard, Deputy Sheriff of Washington County, Florida, in his individual capacity, Defendant-Appellant below.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that is the subject of this petition can be found in the Petition for a Writ of Certiorari at page 1a of the Appendix.

ARGUMENTS IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondent Rackard opposes issuance of the writ of certiorari as sought by Petitioner Buckley.

PERCEIVED MISSTATEMENTS IN THE STATEMENT OF THE CASE

As required by Rule 15.2 of the Supreme Court Rules, Respondent Rackard is required to address perceived misstatements of fact or law in the petition that bear on what issues would properly be before the court if certiorari were granted. There are several significant examples of such misstatements which either are misstatements of fact or law, or which have no record support for the assertions made.

The incident in which Jonathan Rackard, a Deputy Sheriff in rural Washington County, Florida, felt the need to deploy a department issued Taser in drive-stun mode was fairly and completely recorded on videotape. As a result, the need for pre-trial discovery was substantially moderated. Not a single

deposition was taken. As a result, the record evidence consisted of the videotape itself, Deputy Rackard's affidavit in support of his Motion for Summary Final Judgment, certified copies of state court documents reflecting Buckley's no contest plea to having resisted Deputy Rackard's lawful arrest, Buckley's "declaration" in opposition to summary judgment, the Taser Use Report, several photos of Buckley's back, the Washington County Sheriff's Office Taser Policy, a complaint by a "Mrs. Buckley", an Internal Affairs Report, and the report of Plaintiff's "expert" Ronald Lynch.

From this sparse and spartan record the Petitioner's brief includes rhetorical flourishes and hyperbolic embellishments asserted without record support. Buckley's petition opens with the assertion that the Eleventh Circuit's opinion authorizes Taser deployment on citizens, like Buckley, who will suffer "excruciating pain and severe burns through repeated . . . Taser discharges of 50,000 volts of electricity." In fact, there is no evidence *in the record* of how the Taser works, how much electricity is conducted or whether the electrical measurements that explain its operation are volts, watts, amperes, or ohms. Buckley's petition morphed his original reporting at the district court level of the pain he experienced from being merely "intense at the time" to now "excruciating."

As evidence of record in opposition to summary judgment, Buckley's "Declaration" made only passing

reference to any burns indicating only that he developed "Keloid growths at some of the Taser burn points on my body." In contrast, the petition now blithely describes those as "severe burns" without any medical record support whatever as to whether the burns were in any way "severe."

The videographic recording of the entire incident effectively refutes the suggestion in the petition that Petitioner frustrated Deputy Rackard's effort at effectuating a lawful arrest either because he was "physically unable to do so because of his emotional condition or because his hands were cuffed behind his back." A careful review of that videotape makes indisputably clear that Buckley was far from a non-resistor or a mere passive resistor. Contrary to the bold suggestion that Buckley "fell" to the ground, one cannot help but note that Buckley made it well out of the roadway before falling. Buckley's recitation of the case in support of the petition notably fails to mention that Deputy Rackard attempted three times to help Buckley to his feet because to do so would acknowledge that the suggestion that Buckley was unable to get up and not attempting to defeat or delay a lawful arrest is fatuous on its face.

The last of the substantial and gratuitous misstatements of the facts for which there is no record support is the glib assessment that Deputy Rackard's only purpose in tasing Mr. Buckley "was to inflict pain." In stark contrast is the actual evidence of record in which Rackard explained his actions and the reasons for them.

> *"6) Once I was able to transport Mr. Buckley to my patrol car, there was no further Taser application to his person or otherwise. I never punched, kicked, struck, pepper-sprayed or used any other devices to apply any other force to Mr. Buckley.*
>
> *7) I used only such force as I thought was needed to arrest Mr. Buckley after he refused to sign a traffic citation. I tried to persuade Mr. Buckley to sign his traffic citation and tried to persuade him to simply come with me to my patrol car.*
>
> *8) I was concerned that Mr. Buckley might cause me harm either by intent or by accident if I remained at that dark roadside attempting to move him myself."*

Petitioner's description of the Eleventh Circuit's opinion as being "fractured" is indeed a strained description. In fact, Judge Edmondson and Judge Dubina each substantially agreed not only on the decision but on its rationale. Judge Edmondson's opinion focused broadly on the overall reasonableness of Rackard's actions in attempting to complete the arrest of the Plaintiff who was not "fully secured until after the second officer arrived." Judge Edmondson concluded that the three Taser deployments of Rackard were not excessive in a constitutional sense, and therefore were obviously not contrary to clearly established law. Thus, Judge Edmonson opined that Rackard's actions were both constitutional and, at a minimum, entitled to qualified immunity from suit.

Judge Dubina's reasoning, though not a perfect acetate overlay of Judge Edmondson's, had many points of alignment. Judge Dubina agreed that the first two Taser deployments simply did not violate the Constitution at all and that the third was not an affront to clearly established law. Thus two of the panel members agree that two of the Taser deployments were simply lawful. Those same panel members agree that none of the three Taser applications was contrary to clearly established law. Both rehearing and rehearing *en banc* were denied on November 8, 2008 after no Judge in regular active service requested that the court be polled. It is then the opinion of a single District Court Judge, sitting by designation, that concludes Deputy Rackard's actions were violative of the Constitution.

Finally, Respondent respectfully suggests that Petitioner's assertions that "Petitioner never once resisted" and that "neither Petitioner nor Respondent was in actual danger from potential traffic" (Petition for Certiorari at pp. 4-5) are fundamentally wrong and clearly observable as such on the videotape. The Petitioner equates *active* resistance and *violent* resistance. By inference then, only violent resistance with the purpose of causing pain or injury to the officer is "active." Petitioner can envision then only two types of resistance as though they are governed by a legal binary on-off light switch. Instead, more accurately, resistance to lawful authority is better understood as on a continuum or rheostat. Of course there is the "passive resistance" of the sit-down striker

who refuses to move using civil disobedience as an adjunct to political speech on the one hand and armed resistance with a firearm on the other. However, in between and the existence of which is not acknowledged by the Petitioner, is active, though non-violent, physical resistance. Buckley's actions transparently are continuously active in nature though they primarily involve the gravitational laws of physics. Defeating that required a law enforcement officer to subject himself to the perils of vehicular traffic next to a darkened roadside. Though Respondent concedes there is no evidence to support an argument that the purpose of the active resistance is physical injury to Deputy Rackard, that unintended result could be a very real outcome. When a deputy repeatedly attempts to lift a person to accomplish a lawful arrest, and the arrestee moves so as to make it impossible to lift him, the arrestee moves to a middle ground on the continuum that is less than active violent resistance but is more than merely "passive." It is within that gray middle ground fact-bound morass, that one must determine what is reasonable, and whether it has been clearly established as such.

REASONS FOR DENYING THE PETITION

Petitioner encourages the court to issue the writ because the Eleventh Circuit's opinion below is inconsistent with *Graham v. Connor*, 490 U.S. 386 (1989) and *Hope v. Pelzer*, 536 U.S. 730 (2002), because the case presents recurring questions of ever increasing

importance, and because this case presents an ideal vehicle for review because of the "undisputable record." Respondent argues that none of those assertions is true or valid.

I. Conflict with Other Decisions

The first thing that should be kept in mind is that the narrowest grounds on which the Circuit court majority agreed is that the actions of Deputy Rackard in deploying his Taser three times in drive-stun mode were not contrary to clearly established law. In order for Rackard individually to enjoy qualified immunity from suit, so long as he does not use force which is objectively unreasonable, no constitutional tort arises.

The decision of the Eleventh Circuit below is not in conflict with either *Graham v. Connor*, 490 U.S. 386 (1989) or *Hope v. Pelzer*, 536 U.S. 730 (2002). *Graham* teaches that in deciding whether a given application of force is lawful, consideration must be given to the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or officers, and whether there is active resistance or attempt at flight. *Hope* explains that although it is not always necessary for pre-existing case law to be "materially similar" or "fundamentally similar" to provide the "fair warning" required by *Hope*, for qualified immunity to be denied, the alleged wrongful conduct must lie so obviously at the core of

the right violated, that the unlawfulness of the conduct is readily apparent.

It is apparent that what the Eleventh Circuit's panel did was the analytical process required for resolution of qualified immunity questions at the time. It employed the "rigid order of battle" required by *Saucier v. Katz*, 533 U.S. 194 (2001), and *Brosseau v. Hagan*, 543 U.S. 194, 201-202 (2004). They determined first whether the Constitution had been violated and then moved on to whether on a given set of facts, the right and its factual parameters was clearly established. This process was required until *Pearson v. Callahan*, 129 S.Ct. 808 (2009) was decided earlier this year. Respondent suggests that there is no conflict with the decisions of this court. Petitioner attempts to manufacture conflict not by the content of the Eleventh Circuit's opinion but by what that opinion purportedly "resurrected" *sub-silentio* – that is what the opinion *did not* say was in conflict with the law as established by this court.

The circuit court worked its way through the "fact bound morass" of what is reasonable, balancing the nature and quality of the governmental intrusion against the importance of the governmental interests involved. *Scott v. Harris*, 550 U.S. 372 (2007). It properly considered the physical hazards and dangers, that Buckley's type of resistance prevented Rackard from "truly controlling" Buckley, Rackard's failed but repeated efforts at persuasion prior to Taser deployment, Rackard's repeated pre-deployment warnings, and Rackard's efforts to assist Buckley to his

feet at least three times prior to de-ployment. This the court concluded, after careful application of facts, was not unreasonable at least two of three times, and not contrary to clearly established law as to the third. The Eleventh Circuit did exactly as guided by this Court.

Petitioner further argues that the writ should issue because the Buckley decision below has "created a conflict among the circuits where none previously existed." (Petition for Certiorari at p. 12). Petitioner cites to five different circuit court opinions in support of that assertion. In fact, each of the decisions referenced is readily distinguishable and none is logically in conflict with the decision *sub judice*. *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125 (9th Cir. 2002) involved the deployment of pepper spray on persons participating in a "peaceful protest." It is not clear from the opinion that the officer's uses of force were intended to accomplish an arrest. Instead the pepper spray was utilized to disperse people who had utilized devices known as "black bears" to connect themselves to each other thereby effectively incapacitating themselves. The pepper spray was being used as a matter of policy and a tactical response on a number of occasions to discourage the protesters continued use of this tactic. This fact pattern does not then involve use of moderate non-lethal force in effectuation of lawful arrests on persons who had the ability to effectively resist.

Petitioner points to the Ninth Circuit once again in *LaLonde v. County of Riverside*, 204 F.3d 947 (9th

Cir. 2000). However, the narrow holding in that pepper spray case is that it was error to take from a jury by case dispositive motion the question over whether it was constitutionally excessive force to refuse for twenty to thirty minutes to rinse out the eyes of a person pepper sprayed. After the arrest of this Petitioner, it is undisputed that Deputy Rackard inflicted no additional pain or injury and did not act so as to exacerbate Mr. Buckley's discomfort. The *LaLonde* court merely decided factual disputes remained for jury consideration.

Petitioner argues that inter-circuit conflict arises between the Eleventh Circuit's decision below and *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007). In fact, *Casey* is readily distinguishable and can be easily harmonized. In *Casey*, a Fourth Amendment violation occurred because Taser deployment occurred "immediately and without warning." *Casey*, at 1285. The Court even commented that it did not rule out the possibility that there might be circumstances in which the use of a Taser against a non-violent offender might be appropriate, particularly when officers were confronted with "active" (as distinguished from "violent") resistance. When the Tenth Circuit confronted a fact pattern remarkably similar to that presented in this case involving the use of pepper spray on a female after numerous warnings during a traffic stop who offered passive resistance and repeatedly refused lawful commands, the court found no constitutional violations emphasizing safety concerns for the officer who worked at a

"narrow shoulder of a busy highway over fifty minutes." It should be mentioned that this decision arose from an incident which occurred in broad daylight. *Mecham v. Frazier*, 500 F.3d 1200 (10th Cir. 2007).

Petitioner's citations to *Amnesty America v. Town of West Hartford*, 361 F.3d 113 (2d Cir. 2004) and *Buck v. City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008) for the proposition that each demonstrates inter-circuit conflict is unsupportable. Each of those cases did little more than decide either that disputed issues of fact precluded resolution as a matter of law or that the allegations in a complaint were sufficient to survive a motion to dismiss. *Amnesty America* was an official capacity case and did not invoke the qualified immunity question. *Buck* is not factually the equivalent of this case in that it involved the deployment of tear gas and pepper balls on political demonstrators at the University of New Mexico. The force was deployed on numerous people, many of whom were simply exercising their First Amendment Rights and who were not resisting any effort at lawful arrest.

Finally, Petitioner's reference to *Hickey v. Reeder*, 12 F.3d 754 (8th Cir. 1993) to support an argument for inter-circuit conflict seems the greatest stretch. That case, raising Eighth Amendment issues, brought into question the deployment of a stun gun not to aide in accomplishing a lawful arrest, but to simply coerce a prisoner into sweeping his cell floor. There is a wide conceptual chasm between whether it is reasonable for a lone officer on a darkened roadside to deploy a

Taser to accomplish the lawful arrest of an actively, albeit non-violently, resisting person and the deployment of a Taser on a person to enforce jail cell cleanliness standards in a secure setting with six or seven fellow correctional officers present.

The Petitioner concludes his survey of other circuits' contrary decisions by commenting:

> *"All four circuits understood what the Eleventh Circuit failed to grasp – the Fourth Amendment does not permit the deliberate infliction of pain on submissive non-violent arrestees."* (Petition for Certiorari at p. 14)

This much we all grasp. It is a truism. What the Petitioner does not grasp is what the Eleventh Circuit understood. Mr. Buckley was not clearly identifiable as a "submissive non-violent arrestee" who posed no threat of injury or harm to Deputy Rackard or himself and, once he was "controlled", no additional deployments of Tasers or other applications of force occurred.

II. The Question Presented Does Not Need Supreme Court Resolution

The paths of Mr. Jesse Buckley and Deputy Jonathan Rackard intersected on March 17, 2004. At that time Tasers were a much less familiar device issued to law enforcement officers as a less-than-lethal force option. Florida's experiences with them in the last few years has led the Florida Legislature, as a matter of state-wide policy, to establish guidelines

for their use which are almost certainly more restrictive than that imposed by the Fourth Amendment to the United States Constitution. Effective June 26, 2006, Florida enacted Florida Statute §943.1717(1). It provides:

> *"A decision by a law enforcement officer, correctional officer, or correctional probation officer to use a dart firing stun gun must involve an arrest or a custodial situation during which the person who is the subject of the arrest or custody escalates resistance to the officer from passive physical resistance to active physical resistance and the person:*
>
> *(a) Has the apparent ability to physically threaten the officer or others; or*
>
> *(b) Is preparing or attempting to flee or escape."*

Respondent acknowledges that he would argue that his actions toward Mr. Buckley would remain proper even under Florida's new stricter statute. However, the average non-violent political protester at a sit-in, in Florida, has not faced the threat of lawful Taser deployment for almost three years.

Furthermore, the Eleventh Circuit has not countenanced the arbitrary and gratuitous use of Tasers that the Petitioner fears, should the Petition be denied. Without any factually similar case, the Eleventh Circuit has denied qualified immunity to police officers who tased a "motionless and frightened" 53 pound 6 year old who after disrupting her elementary

school class, apparently held officers at bay with a one-half inch piece of glass. *Moretta v. Abbott*, 280 Fed. Appx. 823 (11th Cir. 2008), non-published opinion.

III. This Case is Not an Ideal Vehicle for Review of the Questions Presented

That this case is factually simple and because the incident can be viewed on YouTube (as conveniently but unnecessarily advertised in the Petition) does not make it the ideal case to decide device-specific standards for the use of force by law enforcement officers.

Good science has been and is being done on the bio and electro-mechanics of the operation of the Taser. These studies are being done by not only its manufacturer, but independent researchers, and even the United States Military. For example, on October 18, 2004, the Department of Defense issued its report on "Human Effectiveness and Risk Characterization of Electromuscular Incapacitation Devices." Last year academic researchers at Wake Forest University, Virginia Commonwealth University, George Washington University and Louisiana State University published "Safety and Injury Profile of Conducted Electrical Weapons Used by Law Enforcement Officers Against Criminal Suspects."

Though Petitioner has repeatedly commented that Tasers deliver a 50,000 volt current, this record provides no scientific context informing whether that factoid has any meaning beyond that it sounds "shocking."

With an appropriate science and technology supported record the court could consider, in proper scientific context, that the Taser, though high voltage is needed to deliver an incapacitating stun, is a low current system that delivers only about 3.8 milliamps, or less than 4/1000 of an amp. From a proper record the court could evaluate a given use of force armed with the knowledge that static-electricity from a door knob after walking on carpet in stocking feet during winter might yield a 50,000 volt shock. There are numerous cases among the more than one hundred federal court decisions referenced in the Petition where the Supreme Court's record would be supported by not only a video but depositions and expert testimony from which an opinion could be rendered based upon other than a mere videotape and the repeated chanting of 50,000 volts in a scientific void.

CONCLUSION

The Petition should be denied. The Eleventh Circuit's narrowest holding on which the majority of judges would both agree, is that Deputy Rackard's decision to deploy a Taser to a continuously actively, though not violently, resisting person after repeated warnings to accomplish a lawful arrest was entitled to qualified immunity is not erroneous. Conflicts among the circuits have not been shown to exist, and this scant record provides very little for this court to

work from to define standards of nationwide application.

Respectfully submitted,

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